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No. 03-710

IN THE

Supreme Court of the United States

GERALD DEVENPECK, *et al.*,
Petitioners,

v.

JEROME ANTHONY ALFORD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an arrest that violates the Fourth Amendment – because the specific and articulable facts that impelled the arrest did not establish objective probable cause to believe the charged offense had been committed – can be justified post hoc on the basis of facts and offenses unrelated to the facts and offenses that impelled the initial arrest.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. BECAUSE OFFICER HANER LACKED PROBABLE CAUSE FOR BELIEVING THAT RESPONDENT VIOLATED THE PRIVACY STATUTE, RESPONDENT'S ARREST WAS UNLAWFUL 3

A. The Fourth Amendment Requires Courts To Assess Probable Cause For An Arrest On The Basis Of The Particularized Facts That Objectively Justified The Arrest 4

B. The Closely Related Offense Doctrine Is Consistent With The Fourth Amendment Standard Of "Objective Reasonableness" 14

C. The Closely Related Offense Doctrine Is Supported By Sound Policy 15

II. THE QUALIFIED IMMUNITY QUESTION RAISED BY PETITIONERS IS NOT PROPERLY BEFORE THE COURT 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 21, 22

Avery v. King, 110 F.3d 12 (6th Cir. 1997) 16, 17

Beck v. Ohio, 379 U.S. 89 (1964) 8, 9, 10

Biddle v. Martin, 992 F.2d 673 (7th Cir. 1993) 16, 17

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 12

Delaware v. Prouse, 440 U.S. 648 (1979) 8

Florida v. Royer, 460 U.S. 491 (1983) 11, 12

Hiibel v. Sixth Judicial Dist. Ct., 124 S. Ct. 2451 (2004) 8

Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) 12

Indianapolis v. Edmond, 531 U.S. 32 (2001) 10

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994) 12

Mills v. Wainwright, 415 F.2d 787 (5th Cir. 1969) 16

Montana v. Egelhoff, 518 U.S. 37 (1996) 12

Ornelas v. United States, 517 U.S. 690 (1996) 10

Peters v. New York, decided with *Sibron v. New York*,
392 U.S. 40 (1968) 12

Scott v. United States,
436 U.S. 128 (1978) 11, 13

Seminole Tribe v. Florida,
517 U.S. 44 (1996) 12

Sheehy v. Town of Plymouth,
191 F.3d 15 (1st Cir. 1999) 17

Stacey v. Emery,
97 U.S. 642 (1878) 5, 7

Terry v. Ohio,
392 U.S. 1 (1964) 8, 10

Trejo v. Perez,
693 F.2d 482 (5th Cir. 1982) 17, 18

United States v. Atkinson,
450 F.2d 835 (5th Cir. 1971) 16, 17

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 9

United States v. Cortez,
449 U.S. 411 (1979) 8

United States v. Di Re,
332 U.S. 581 (1948) 8

United States v. Kalter,
5 F.3d 1166 (8th Cir. 1993) 17

United States v. Rambo,
789 F.2d 1289 (8th Cir. 1986) 17

United States v. Robinson,
414 U.S. 218 (1973) 11, 14

Vance v. Nunnery,
137 F.3d 270 (5th Cir. 1998) 15, 16, 17, 18

Wainwright v. New Orleans,
392 U.S. 598 (1968) 19

Whren v. United States,
517 U.S. 806 (1996) 5, 6

Wilson v. Layne,
526 U.S. 603 (1999) 22

Wong Sun v. United States,
371 U.S. 471 (1963) 8

STATUTES

725 Ill. Comp. Stat. Ann. 5/103-1(b) 19

Ken. Rev. Stat. Ann. § 431.025(1) 19

Minn. Stat. 611.01 19

Or. Rev. Stat. § 133.235(3) 19

S.C. Code Ann. § 17-13-50 19

Utah Code Ann. § 77-7-6(1) 19

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers as amicus curiae in support of respondent.[1]

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including the protection of Fourth Amendment liberties. NACDL has frequently filed *amicus curiae* briefs in this Court in cases implicating its substantial interest in safeguarding the individual liberties guaranteed by the Fourth Amendment. *See, e.g., Kyllo v. United States*, 533 U.S. 27 (2001); *Bond v. United States*, 529 U.S. 334 (2000); *Indianapolis v. Edmond*, 531 U.S. 32 (2000).

SUMMARY OF ARGUMENT

I. Respondent was arrested on the basis of facts establishing conduct that is not unlawful in the state of Washing-

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and nobody other than *amicus*, its members, or its counsel contributed monetarily to the brief.

ton. That arrest cannot be justified post hoc on the basis of *other* facts that were *not* the true grounds for his arrest, but that could have justified an arrest for a different, wholly unrelated offense. In requiring petitioners to justify the arrest only on the basis of the conduct and offense for which petitioner was arrested – or at least on the basis of some closely related offense – the court of appeals adhered to fundamental Fourth Amendment principles prohibiting police officers from intruding on a private citizen's personal liberty unless the individual officer has an individualized basis for believing that the private citizen has committed a particular offense. Contrary to petitioners' submission, the "closely related offense" doctrine applied by the court of appeals does not require courts to inquire into the subjective motives of individual arresting officers and thus is not inconsistent with precedents prohibiting such inquiries. Rather, the doctrine avoids such inquiries by focusing on the objective facts and circumstances justifying an arrest, including the objectively stated grounds for an arrest. The doctrine thereby advances sound Fourth Amendment and law enforcement principles: it excuses purely technical mistakes in charging by allowing the state to rely on closely related offenses to justify an arrest (further reinforcing the focus on the objective circumstances) while precluding the state from surprising a defendant with post hoc rationalizations for an arrest that could not be legally justified on its own terms.

II. If the Court holds that petitioners cannot justify their arrest on the basis of an offense unrelated to the offense for which respondent was arrested, the Court should not address the distinct qualified immunity issue petitioners also seek to raise. Petitioners incorrectly characterize that issue as whether the close related offense doctrine was established with sufficient clarity to hold them liable for the arrest. Neither petitioners nor the courts below addressed the qualified immunity question in those terms. Rather, petitioners and both the majority and dissenting opinions assumed the question was whether petitioners had sufficient notice that respondent's arrest was unlawful under the Washington Privacy Act. And that question, in turn, is resolved by the jury instruction – unchallenged by petitioners – that it was "clearly established" at the time of the arrest that respondent's conduct did not violate the Privacy Act. Accordingly, the qualified immunity issue briefed by petitioners is not properly presented and should not be addressed by the Court.

ARGUMENT

I. BECAUSE OFFICER HANER LACKED PROBABLE CAUSE FOR BELIEVING THAT RESPONDENT VIOLATED THE PRIVACY STATUTE, RESPONDENT'S ARREST WAS UNLAWFUL

Petitioners arrested respondent for violating the Washington Privacy Act, Wash. Rev. Code Ann. § 9.73.030(1)(b), because respondent was taping his conversation with Officer Haner without Haner's consent. The Privacy Act charge was later dismissed as groundless, and the district court in this case further determined – and the jury was instructed – that it was "clearly established" at the time of the arrest that "the conduct for which [respondent] was arrested was not a violation of the Privacy Act." Pet. App. 10a. Petitioners did not challenge on appeal, and do not challenge in this Court, the propriety of this jury instruction.

It is thus undisputed that petitioners lacked probable cause to arrest respondent for violating the Privacy Act. According to petitioners, however, respondent's arrest was nevertheless lawful, because petitioners *would have had* probable cause to arrest for him for an entirely unrelated offense, *if* they had arrested him for that offense. Petitioners contend that the actual, asserted basis for the arrest is utterly immaterial under the Fourth Amendment. All that matters, they say, is whether a hypothetical, reasonable officer in the same situation would have had probable cause to arrest respondent for *any* offense.

Petitioners are wrong. Their argument depends fundamentally on a mistaken conflation of an individual officer's *subjective motives* for an arrest with the *objective basis in fact* for the arrest. The motives of an individual officer are indeed irrelevant under the Fourth Amendment, as this Court has held since its earliest days. But that is far different from holding that the factual basis for an arrest is irrelevant to Fourth Amendment analysis. It is not. As we elaborate below, this Court's Fourth Amendment jurisprudence establishes that before a police officer may arrest a person for an offense, the officer must have probable cause, supported by particularized facts, for believing that the person committed an offense. If the particularized facts that justified the arrest do not establish probable cause for believing that the person committed the offense (or one closely related), then the arrest was not justified and therefore was not lawful. The prosecutor cannot cure that unlawful arrest post hoc by pointing to *other* facts that were *not* the objective basis for the arrest, but that would have justified an arrest on entirely *different* and *unrelated* grounds.

Motives may not matter in Fourth Amendment analysis. But facts do. The facts that led to an arrest either established probable cause for that arrest or they did not. If they did, then the arrest is lawful, even if the officer had bad motives for making the arrest. If they did not, then the arrest is unlawful, even if the prosecutor can later point to different facts that could have justified a different arrest.

A. The Fourth Amendment Requires Courts To Assess Probable Cause For An Arrest On The Basis Of The Particularized Facts That Objectively Justified The Arrest

1. Petitioners' attack on the closely related offense doctrine starts – and basically ends – with the premise that probable cause is assessed by a test of "objective reasonableness," which "applies without regard to the motives of the

officers involved." Petrs. Br. 17; *see also* U.S. Br. 11. According to petitioners, that principle resolves this case: it is irrelevant that Officer Haner mistakenly identified the Privacy Act as a basis for the arrest, they say, because Officer Haner's subjective intent in arresting respondent is irrelevant to the probable cause inquiry.

That analysis rests on a misreading of this Court's cases addressing subjective motives in the Fourth Amendment context. What those cases hold is that, so long as the officer specifies an objectively reasonable basis for an arrest, a court cannot engage in a "pretext" inquiry to determine whether the officer was *actually* motivated by a different, malicious or unlawful reason for making the arrest. In *Stacey v. Emery*, 97 U.S. 642 (1878), for instance, a tax collector had seized the plaintiff's property on the asserted ground that it was part of a tax fraud scheme. The plaintiff argued that the seizure was actually motivated by malice against the plaintiff. This Court responded:

> This is an error. The question of malice or of good faith is not an element in this case. It is not a question of motive. If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed, it is sufficient. Whether the officer seized the occasion to do an act which would injure another . . . is quite immaterial.

Id. at 645. Phrased otherwise, the Court explained, all that matters is whether there were "circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offence with which he is charged." *Id.* (internal quotation marks omitted).

This rule precluding inquiry into whether the basis for an arrest was pretextual is the rule applied in *Whren v. United States*, 517 U.S. 806 (1996), the case on which petitioners and their *amici* so heavily rely. In *Whren*, the officer pulled

a car over on the asserted ground that the driver committed traffic violations. It was not disputed that the officer had probable cause for that action. *Id.* at 810. The defendants, however, sought to show that the traffic violation was a mere pretext for the officer's "real" motive, i.e., to conduct a search for drugs, or simply because the occupants were black, motives that would not give probable cause for the stop. This would be consistent, they argued, with the Court's "past cases' disapproval of police attempts to use valid bases of action against citizens as pretexts for pursuing other investigatory agendas." *Id.* at 811. The Court rejected this approach, holding instead that the prior cases "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Id.* at 813. Further, the Court held that the defendants could not seek to inquire into the officer's subjective motives through the ostensibly "objective" device of showing that a "reasonable officer" would not have made the stop. *Id.* at 813-14. That approach, the Court explained, still reflects an impermissible effort to prove that the stop was pretextual:

> Its whole purpose is to prevent the police from doing under the guise of enforcing the traffic code what they would like to do for different reasons. Petitioners' proposed standard may not use the word "pretext," but it is designed to combat nothing other than the perceived "danger" of the pretextual stop, albeit only indirectly and over the run of cases. Instead of asking whether the individual officer had the proper state of mind, the petitioners would have us ask, in effect, whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind.

Id. at 814.

The difference between this case and cases such as *Stacey* and *Whren*, and all the cases discussed in *Whren*, is self-evident. In each of those cases, the officers at least had an objectively lawful and supportable "pretext" for the search or seizure when it was conducted. Not so here. Indeed, to the contrary, the cited "pretext" for the arrest – the Privacy Act charge – in this case was concededly *unlawful* and *not* supported by the facts that formed the basis for the arrest. If the asserted basis for the arrest is what the Fourth Amendment cares about, as the *Stacey-Whren* principle suggests, then the arrest in this case plainly violated the Fourth Amendment.

This case, in other words, has nothing whatsoever to do with whether or not the grounds for the arrest were a "pretext" for an ulterior motive. We may concede that the officer had no ulterior, unlawful motive in arresting respondent for violating the Privacy Act. But petitioners must concede that it was unlawful to arrest respondent on that basis. The question here is whether the arrest can be justified post hoc on some other basis that would have been lawful, if respondent had been arrested on that ground.

2. This Court's precedents indicate that the answer to that question must be no. As the Court in *Stacey* described the reasonableness inquiry, the question is whether the facts would support a reasonable officer in concluding "that the party is guilty *of the offense with which he is charged.*" *Stacey*, 97 U.S. at 645 (emphasis added). In several respects, the precedents establish that the question whether an officer had probable cause to arrest a person for a particular offense should be determined with respect to the facts that justified the arrest for *that* offense (or one closely related), rather than by scouring the record post hoc for *other* facts that could have justified an arrest for *other*, unrelated offenses.

To start, this Court's precedents demand that the individual police officer who made the arrest (or stop or search) be able to "justify[] the particular intrusion" by "point[ing] to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that

intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* at 22 n.18; *see United States v. Cortez*, 449 U.S. 411, 418 (1979). This requirement obviously is not imposed as an academic exercise – a sort of after-the-fact game of find-the-facts-to-justify-the-intrusion-on-liberty. The requirement is, rather, a demand placed on each officer in the field: do not stop or arrest citizens unless there are specific and articulable facts that give you a basis for doing so. *Cf. United States v. Di Re*, 332 U.S. 581, 595 (1948) ("It is the officer's responsibility to know what he is arresting for, and why . . . .").

Consistent with that principle, the cases instruct courts to inquire not into the sufficiency of the facts that *might* have justified the officer's intrusion, but into the facts that *did* justify the officer's intrusion. Thus in *Terry*, the Court described "reasonableness" in the probable cause inquiry as "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to *the circumstances which justified the interference in the first place*." *Terry*, 392 U.S. at 20 (emphasis added); *see Hiibel v. Sixth Judicial Dist. Ct.*, 124 S. Ct. 2451, 2459-60 (2004). Similarly, in *Wong Sun v. United States*, 371 U.S. 471, 480 (1963), the Court described the "threshold" question as "whether the officers could, *on the information which impelled them to act*, have procured a warrant for the arrest of [a suspect]." *Id.* at 480 (emphasis added). In *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), the Court emphasized the Fourth Amendment's requirement in all seizure cases "that the facts *upon which an intrusion is based* be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test." *Id.* at 654 (emphasis added). And in *Beck v. Ohio*, 379 U.S. 89 (1964), the Court warned that unless the trial court is "informed of the facts *upon which the arresting officers acted*," the court "cannot

properly discharge [its] function" of reviewing the constitutional validity of the arrest." *Id.* at 96 (emphasis added).

There was no suggestion in any of these cases that the officers could point to *other* circumstances or information which did not impel them to act, but which could have justified action. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court was even clearer, explicitly rejecting the Government's effort to justify an otherwise unlawful stop on the basis of record facts that could have justified the stop:

> The Government also argues that the location of this stop should be considered in deciding whether the officers had adequate reason to stop respondent's car. This appears, however, to be an after-the-fact justification. At trial the officers gave no reason for the stop other than the apparent Mexican ancestry of the car's occupants.

Id. at 886 n.11.

This fundamental requirement that the individual officer be able to point to the specific and articulable facts that justified his action at the time (whatever his ulterior motives) loses force if the inquiry becomes whether any of the surrounding facts could have justified the same action in theory. Indeed, even the logic of the requirement becomes dubious: it can be important that the officer be able to identify specific and particularized facts only if they are specific and particularized *as to something*. Clearly, the assumption underlying the precedents is that the facts be particularized *to the offense for which the person was arrested*. And requiring that the officer who made the arrest be able to identify those facts shows that it matters what facts impelled that officer, at that time, to act.

Under the standard urged by petitioners, however, the facts that impelled the action are irrelevant. All that matters is whether there are any facts that *could* have impelled an intrusion. Under this standard, police officers on the scene

have much less incentive to consider whether the facts specifically justify an intrusion on a citizen's liberty. Secure in the knowledge that a prosecutor will scour the record post hoc to identify facts and offenses that would justify an intrusion (with the officer's recollections of the circumstances influenced by the new offenses identified as possible grounds for the arrest),[2] officers will be more likely to act on the basis of generalized suspicion of wrongdoing than on a particularized suspicion of criminal activity. *Cf. Indianapolis v. Edmond*, 531 U.S. 32 (2001) ("We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime."); *Terry*, 392 U.S. at 21 (this Court has "consistently refused to sanction" "intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches").

This is not say that the Court has condoned inquiry into the individual officer's actual *motives* for making an arrest on a given basis. It is to say, however, that the Fourth Amendment principles recognized by this Court *do* care about the facts and circumstances invoked to justify an arrest. As petitioners concede, an arrest may be justified only upon the basis of facts actually within the knowledge of the arresting officer. Petrs. Br. 16. What is more, this Court's cases have made clear that the court may consider the individual officer's own personal, subjective experiences in determining whether the officer had probable cause. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 700 (1996). All must agree, in other words, that the perspective of the arresting officer is not utterly irrelevant for Fourth Amendment purposes. The Fourth Amendment question is whether that officer, based on what that officer personally experienced

[2] *See Beck*, 379 U.S. at 96 ("an after-the-event justification for the arrest or search [is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment").

and knew, had a basis for the action *that officer actually took*. Although that question is evaluated from the objective perspective of a reasonable officer, the question is not whether a reasonable officer could have taken a different action. It is whether a reasonable officer could have taken the same action. Thus, if the individual officer arrested a person on the basis of specific, particularized facts showing that he was taping a conversation with the police officer, the Fourth Amendment question is whether a reasonable officer would have arrested a person on that basis. If the answer is no, it is irrelevant whether a reasonable officer could have pointed to other facts justifying an arrest on an entirely different basis.

3. We have already shown why *Whren* and other cases precluding inquiry into "pretext" do not compel a contrary result. In the end, petitioners' position rests on statements in three opinions: *Florida v. Royer*, 460 U.S. 491 (1983), *Scott v. United States*, 436 U.S. 128 (1978), and *United States v. Robinson*, 414 U.S. 218 (1973). None of these cases provides them adequate support.

a. Petitioners point to a single statement in the plurality opinion in *Royer*: "[T]he fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying Royer's custody by proving probable cause[.]" 460 U.S. at 507. For three reasons, this statement does not authorize after-the-fact rationalizations of otherwise unlawful arrests.

First, the statement is unambiguously dictum. In *Royer*, a plurality of the Court held that the respondent was illegally detained when he consented to have his luggage searched, and therefore the resulting search was illegal. 460 U.S. at 507-08. The plurality's comment that the state could prove probable cause despite the arresting officer's belief that probable cause was lacking had nothing to do with the holding, outcome, or analysis in *Royer*. This Court has repeatedly warned that such statements are of no controlling force:

"It is to the holdings of our cases, rather than their dicta, that we must attend." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994); *see Montana v. Egelhoff*, 518 U.S. 37, 56 (1996); *Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627 (1935); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

Second, although statements in dictum can be persuasive authority to the extent they are soundly reasoned, the *Royer* dictum is conclusory and supported by a dubious citation. *Royer* cites *Peters v. New York*, decided with *Sibron v. New York*, 392 U.S. 40, 66-67 (1968), in which the Court held admissible the fruits of an off-duty policeman's search of a burglary suspect. In *Peters*, a police officer personally observed conduct that reasonably caused him to be suspicious of the suspect's activities and to fear that he was in danger. *Id.* at 48. Accordingly, the officer's arrest and search of the suspect was found to be supported by probable cause. *Id.* at 66. Nothing in the record indicated that the police officer believed he lacked probable cause to stop and search the suspect. Accordingly, *Peters* does not support the proposition set forth in *Royer*.

Third, even on its own terms, it is not clear that the statement actually endorses the kind of sweeping post hoc justification for arrests urged by petitioners. The statement in *Royer* merely observes that the officers believed that they did not have probable cause to detain the traveler for suspicion of criminal activity. It is possible, however, that the officers did have a particularized basis in fact for suspecting that an offense had been committed, but merely mistakenly believed that those facts, as matter of law, did not add up to probable cause. But at least in that scenario, the question could be whether a reasonable officer would be justified in arresting on the basis of those same particularized facts. Here, by contrast, the question is whether the State could point to a set of entirely unrelated facts as establishing probable cause for an arrest that had nothing to do with those facts.

For all these reasons, *Royer* does not compel rejection of the "closely related offense" doctrine.

b. Petitioners also rely on the statement in *Scott* that "the fact that the officer does not have the state of mind . . . hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." 436 U.S. at 138. But in *Scott* – unlike this case – the officers *did* provide from the very outset an adequate "legal justification" for their action: telephone calls were being intercepted consistent with the purpose of the wiretap, with minimized interference with calls unrelated to that purpose. The defendant in *Scott* was complaining that the officers did not, in fact, adequately try to minimize interference, and thus could not justify the wiretaps by showing that there was no actual interference. It was in this context that the Court pointed out that the officers' state of mind was irrelevant: the wiretaps and amount of interference were consistent with the purpose of the wiretaps, and thus whatever else the officers were thinking (or not thinking) when they monitored the calls, the search was not objectively unreasonable.

If anything, the analysis in *Scott* supports the closely related offense doctrine. The key to the Court's opinion was that the interference was objectively consistent with the *stated purpose* of the wiretaps. Like other Fourth Amendment precedents, *Scott* holds that the search was justified because the objective facts and circumstances were consistent with the basis for the search. Here, by contrast, petitioners contend that the objective facts were consistent with *some other basis* for an arrest. *Scott* does not support that position.

c. Finally, petitioners cite *Robinson*, but again their reliance is misplaced. The Court in *Robinson* noted in passing

that a police officer's authority to conduct a search incident to a lawful arrest is unaffected by his lack of either "subjective fear" or a belief that the arrestee was armed. *Robinson*, 414 U.S. at 236. This observation merely confirms the principle, discussed above, that a police officer's subjective motive for a search does not render it illegal if the asserted basis for the search is objectively reasonable. Because the actual basis for the search in *Robinson* was as an incident to a lawful arrest, the officer's motive or state of fear were irrelevant. Here, by contrast, the asserted basis for the arrest was an objectively unreasonable alleged Privacy Act violation. *Robinson* does not validate that arrest in any way.

B. The Closely Related Offense Doctrine Is Consistent With The Fourth Amendment Standard Of "Objective Reasonableness"

Contrary to petitioners' submission, the "closely related offense" doctrine is perfectly consistent with this Court's precedents holding that an officer's motive for making an arrest is irrelevant, so long as the objective, asserted basis for the arrest is supported by the facts and law. Under this Court's cases, when an arrest is made, the articulated basis for that arrest is accepted at face value in order to avoid subjective inquiries. That articulated basis is an objectively ascertainable fact, not a subjective motive or experience. As a result, under the "objectively reasonable" test, the question is simply whether the objective circumstances support the asserted basis for the arrest.

The closely related offense doctrine advances this principle because it maintains focus on the totality of the objective, relevant circumstances. If an officer is (subjectively) mistaken about the precise offense for which the arrest was made, that does not invalidate the arrest if the facts and law, viewed objectively, support the officer's conclusion that the particular conduct at issue justified an arrest. The doctrine accomplishes this end by focusing on the conduct for which

the defendant was arrested – so long as some offense closely related to the offense specified renders the underlying conduct unlawful, the officer had an objective basis for arresting *for that conduct*, and the arrest is valid on that basis. In other words, the doctrine is indifferent to the subjective reasons behind the officer's articulation of the offense, whether the result of ignorance, good faith mistake, bad faith motive, or anything in between. As such, the doctrine represents an application, not a rejection, of the "objective reasonableness" standard.

C. The Closely Related Offense Doctrine Is Supported By Sound Policy

The closely related offense doctrine also advances sound law enforcement policies, contrary to petitioners' contention.

1. To start, it is important to understand the true background and function of the doctrine. The Solicitor General claims that "it is designed to prevent officers from 'justify[ing] what from the outset may have been actually sham or fraudulent arrests on the basis of ex post facto justifications that turn out to be valid.'" U.S. Br. 12 (emphasis added) (quoting *Vance v. Nunnery*, 137 F.3d 270, 275 (5th Cir. 1998)). That is incorrect. The doctrine does have the salutary *effect* of preventing post hoc justifications for arrests that were invalid on their own terms, but the *purpose* of the doctrine is not to invalidate objectively lawful arrests. Just the opposite is true: the closely related offense doctrine was devised, and has been most commonly employed, to *validate* arrests that could objectively be justified on the relevant facts, even though the police officer erred in specifying the precise grounds for the offense. In other words, in the face of a challenge to the validity of an arrest or a civil rights lawsuit seeking damages from an officer, the courts have afforded officers greater, not lesser, protection than that which was available in the absence of the doctrine.

The Fifth Circuit was the first court to develop and employ the "closely related offense" doctrine. Its early cases make clear that the court intended to give officers a certain amount of leeway for technical mistakes in articulating the basis for an arrest: "[W]e want it well understood that when a crime under which the arrest is made and a crime for which probable cause exists are in some fashion related, then there is no question but that there is a valid arrest." *Mills v. Wainwright*, 415 F.2d 787, 790 (5th Cir. 1969). As the court explained in *United States v. Atkinson*, 450 F.2d 835 (5th Cir. 1971), the rule assured the constitutionality of such arrests without forcing police officers to "routinely charge every citizen taken into custody with every offense they thought he could be held for in order to increase the chances that at least one charge would survive the test for probable cause." *Id.* at 838. The rule did preclude the "retroactive[] validat[ion]" of an arrest through "ex post facto extrapolations of all crimes that might have been charged on a given set of facts at the moment of arrest," *id.*, but this limitation – required as a practical matter by this Court's precedents, *see supra* at 7-10 – was the effect of the rule, not its motivating purpose.

As the rule has been further developed and applied in other circuits, it has become even clearer that its true function is to provide a margin of error for officers, not to establish "a game that the arrestee wins," Petrs. Br. 23. *See, e.g.*, *Vance*, 137 F.3d at 275 (doctrine "designed to protect police officers from civil liability for reasonable mistakes in judgment made when they effect warrantless arrests for conduct they believe is criminal"); *Avery v. King*, 110 F.3d 12, 14 (6th Cir. 1997) ("even where there is no probable cause to arrest the plaintiff for the crime charged, proof of probable cause to arrest the plaintiff for a related offense is also a defense which may entitle the arresting officer to qualified immunity"); *Biddle v. Martin*, 992 F.2d 673, 676 (7th Cir. 1993) ("in § 1983 actions for false arrest, probable cause

need not have existed for the charge for which the plaintiff was arrested, so long as probable cause existed for arrest on a closely related charge"); *United States v. Rambo*, 789 F.2d 1289, 1294 (8th Cir. 1986) ("It is immaterial that at the time of the . . . arrest the officers did not have in mind the specific charge upon which the arrest can be justified; the offenses need only be closely related . . . ."); *Sheehy v. Town of Plymouth*, 191 F.3d 15, 20 (1st Cir. 1999) ("An officer's erroneous legal description of the basis for an arrest should not expose the officer to liability if another officer would have concluded that there was probable cause to arrest for a related offense on the basis of the same conduct.").

To be sure, the doctrine preserves the Fourth Amendment guarantee of freedom from unreasonable seizure in the narrow subset of cases in which the charged and uncharged offenses are wholly unrelated. But the reality is that the doctrine is used predominantly as a shield by law enforcement rather than as a sword by arrestees – salvaging arrests and insulating police officers from liability where the arrest otherwise would fail due to a lack of probable cause on the charged offense. *See Trejo v. Perez*, 693 F.2d 482, 486 (5th Cir. 1982) (arrest valid because offenses were related); *Atkinson*, 450 F.2d at 838 (same); *Biddle*, 992 F.2d at 676 (same); *Avery*, 110 F.3d at 14 (same); *United States v. Kalter*, 5 F.3d 1166, 1168 (8th Cir. 1993) (same); *Rambo*, 789 F.2d at 1294 (same).

2. Although the central purpose of the closely related doctrine is "to protect police officers from civil liability," *Vance*, 137 F.3d at 275, courts have accomplished this goal by "strik[ing] a balance which allows the arresting officer to choose which crime she will charge without having to charge every single offense sustainable on the facts, and yet does not 'open[] the door to the "extrapolation" of offenses in an effort to justify a sham arrest.'" *Biddle*, 992 F.2d at 676-77 (quoting *Trejo*, 693 F.2d at 485). This "carefully constructed 'compromise'" has the effect of permitting "freedom of

charge choice," *Trejo*, 693 F.2d at 485-86, while encouraging police officers to make arrests only when they have a valid basis for doing so. *Cf. Vance*, 137 F.3d at 275 (quoting *Gassner v. Garland*, 864 F.2d 394, 398 (5th Cir. 1989)) (doctrine discourages "sham or fraudulent arrests on the basis of ex post facto justifications that turn out to be valid"). In achieving this equilibrium, "the federal courts have both grasped the realities of modern law enforcement and protected our Fourth Amendment freedoms." *Vance*, 137 F.3d at 275.

Petitioners, however, would have the courts go much further, tipping the balance entirely in favor of the police. Invoking a parade of horribles, they warn that if this Court endorses the closely related defense doctrine, police will overcharge or not charge at all, and prosecutors will be paralyzed in their discretionary charging decisions. *See* Petrs. Br. 24-25; *see also* U.S. Br. 19-20. Petitioners, however, do not cite *any* evidence that these alleged horrors have actually befallen the many jurisdictions that have been employing the doctrine for decades. The lack of evidence is hardly surprising, for petitioners' policy concerns do not even make logical sense.

a. First, there is no basis for the claim that the closely related offense doctrine harms arrestees by causing law enforcement to overcharge. As already explained, courts have properly struck the balance where they have precisely to avoid the necessity of charging every conceivable offense. By excusing technical errors regarding the precise offense most applicable to the conduct that caused the arrest, the doctrine ensures that officers need not worry over every last detail in the booking document to ensure preservation of the arrest. It is only post hoc reliance upon entirely unrelated charges that the doctrine precludes. Limiting post hoc justifications to the booked offense (or one closely related) would not "frustrate any legitimate interest of society" because if the officers had probable cause to arrest a citizen on a wholly unrelated offense, "all they had to do was to arrest and book

him" on that charge. *Wainwright v. New Orleans*, 392 U.S. 598, 606 (1968) (Warren, C.J., dissenting from dismissal of writ). And contrary to petitioners' absurd suggestion, Petrs. Br. 24 n.5; *see also* U.S. Br. 19-20, criminal defendants obviously would *not* prefer a system that allows the government to obscure the basis for an arrest and to surprise defendants later with new theories of criminal conduct and new justifications for the arrest. A defendant is plainly better off receiving notice of the bases for his arrest as early as possible (and planning his defense accordingly), rather than having after-the-fact justifications sprung upon him later.

b. Second, it is equally untrue that the closely related offense doctrine harms defendants by causing police to avoid charging at all. Even if the doctrine did lead inevitably to that result, it is hardly clear that defendants are better off with a system that allows police to arrest on a wholly unreasonable basis, only to salvage the arrest with an entirely unrelated after the fact justification. Indeed, an arrestee is more likely to be cautious in his dealings with police if they refuse to divulge any basis for the arrest. By contrast, one charged on unreasonable or sham grounds might reasonably believe unrelated conduct to be irrelevant and let his guard down.[3] In any event, there is no empirical basis for the claim that police will simply keep secret the bases for their arrests. Not only is there no evidence for this in jurisdictions that already recognize the closely related offense doctrine, but in many jurisdictions an arrestee has an affirmative right to be informed of the basis for his arrest.[4]

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[3] Authority extolling the benefits of providing an arrestee with charge information (U.S. Br. 20 n.9) no doubt presumes that *all* charges supported by probable cause are to be articulated, rather than only those that will inevitably be dismissed.

[4] *See, e.g.*, 725 Ill. Comp. Stat. Ann. 5/103-1(b); Ken. Rev. Stat. Ann. § 431.025(1); Minn. Stat. 611.01; Or. Rev. Stat. § 133.235(3); S.C. Code Ann. § 17-13-50; Utah Code Ann. § 77-7-6(1).

c. Petitioners' concerns about curtailing prosecutorial discretion are also baseless. Petrs. Br. 24-25. Petitioners insist that "no sound policy is served by precluding the prosecutor from amending the [unsupported] charge to one for which probable cause does exist," and that "a prosecutor should have authority to amend a charge as additional information is discovered." Petrs. Br. 25. But a prosecutor of course remains free at all times to amend a charging document to include all offenses for which the defendant will be prosecuted. The closely related offense doctrine applies only to the charges that may be cited as justifying the initial arrest. It has nothing to do with the prosecutor's authority to amend a charging document to prosecute a defendant on the basis of newly discovered theories or evidence.

II. THE QUALIFIED IMMUNITY QUESTION RAISED BY PETITIONERS IS NOT PROPERLY BEFORE THE COURT

Even though their conduct violated respondent's Fourth Amendment right to be free from unreasonable seizure, petitioners contend that they are immune from liability under the principles of "qualified immunity" this Court's jurisprudence has developed to protect officers who, although acting reasonably, inadvertently violate suspects' constitutional rights. Amicus NACDL's principal interest in this case is the underlying probable cause issue, but because qualified immunity reduces police officers' incentives to respect defendants' rights, NACDL has views on that issue as well. *See infra* note 5. For the reasons briefly elaborated below, however, we submit that the qualified immunity question is not properly presented here and should not be addressed.

To start, it is important to clarify the qualified immunity issue as it comes to this Court. The applicable standard is settled: petitioners are immune from liability for their unlawful arrest of respondent if "a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers

possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). A critical component of this inquiry is whether the officers violated "clearly established law."

Petitioners and the United States treat the "clearly established law" issue as whether the closely related offense doctrine was clearly established at the time of respondent's arrest. This is incorrect. Petitioners did not assert qualified immunity in the trial court on the basis of judicial disagreement over the closely related offense doctrine. The jury was instructed only that "under clearly established law, the conduct for which Alford was arrested was not a violation of the Privacy Act." Pet. App. 10a, 11a. Petitioners do not appear to have requested – and certainly did not receive – any instruction as to whether the closely related offense doctrine was clearly established law. Nor did petitioners raise this defense on appeal. The Ninth Circuit raised the doctrine itself just before oral argument, Pet. App. 24a, but the court addressed the doctrine only in relation to the question of whether petitioners' conduct violated the Fourth Amendment, not the separate question of whether the doctrine was established with sufficient clarity to afford petitioners a qualified immunity defense. The majority and dissenting opinions debated whether respondent's arrest violated clearly established law *under the Privacy Act*, *see* Pet. App. 11a (maj. op.), 20a (dissent), but neither opinion considered whether the closely related offense doctrine was clearly established law when respondent was arrested. That question therefore is not properly before this Court.

The proper question – as all three judges on the panel below recognized – is whether it was clearly established at the time of the arrest that respondent's conduct did not violate the Privacy Act. But that question, too, is not adequately presented here. The jury was instructed that respondent's arrest was clearly unlawful under the Privacy Act, and petitioners did not challenge that instruction on appeal or in this Court.

In short, apart from the underlying question whether petitioners' conduct violated the Fourth Amendment at all, this case does not adequately present any qualified immunity issue. If petitioners cannot now justify the arrest on the basis of an offense related to the alleged Privacy Act violation – if the arrest was unlawful under the Fourth Amendment, in other words – they have effectively waived any claim to immunity on the ground that a reasonable officer might have *thought* the arrest could be justified post hoc on the basis of an uncharged, unrelated offense. Accordingly, if the Court affirms the decision below to the extent it followed the closely related offense doctrine in analyzing the legality of respondent's arrest, the Court should decline to address the additional qualified immunity questions petitioners raise.[5]

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[5] It is not clear the approach taken by petitioners and the United States makes analytical sense in any event. A right is clearly established for purposes of qualified immunity if officers may "reasonably anticipate when their conduct may give rise to liability for damages." *Anderson*, 483 U.S. at 639 (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)); *see also Wilson v. Layne*, 526 U.S. 603, 617 (1999) (whether "reasonable officer could [] have believed that his actions were lawful"). Petitioners' "conduct" in this case was the arrest of respondent for violation of the Privacy Act. That arrest, when it occurred, was unreasonable because it was clearly established that the Act did not criminalize respondent's conduct under the circumstances. It makes little sense to ask whether a reasonable officer who makes an arrest on a patently unreasonable basis would have done so because he (a) expected that the trial court would follow the closely related offense doctrine, and (b) assumed that the prosecutor would be able to come up with some adequate post hoc rationalization for the arrest. In other words, an officer who makes an arrest on a patently unreasonable basis may reasonably anticipate that the arrest will give rise to liability for damages, and thus there is no unfairness in denying the officer immunity. The officer who reasonably believes there is a valid basis for the arrest can easily assure himself of immunity simply by charging that offense, which is consistent with sound law enforcement and Fourth Amendment policies in any event. Accordingly, it is unsurprising that no court that has applied the closely related doctrine in the context of a § 1983 lawsuit has considered the question whether the doctrine – as opposed to the actual basis for the arrest – was clearly established law at the time of the arrest.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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